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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 402.

THOMAS M. WAMPLER,
Appellant,

versus

EDWIN LEE LECOMPTE, FREDERICK S. BARBER,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

BRIEF FOR APPELLEE.

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Appeal from the Court of Appeals of Maryland.

BRIEF FOR APPELLEE.

This is an appeal from a judgment of the Court of Appeals of Maryland, affirming a decree of the Circuit Court for Charles County dismissing the appellant's bill in equity. This appeal seeks to bring before this Court the validity of Sections 39, 40 and 46 of Chapter 568 of the Acts of the Legislature of Maryland for the year 1927, as amended by Chapter 366 of the Acts of 1929. These sections as amended are now codified as Sections 40, 41 and 46 of Article 99 of the Code of Public General Laws of Maryland (Bagby's Edition, 1929 Supplement) under the title "Water Fowl—Birds

and Game." They are printed in an appendix to the brief of the appellee in support of the motion to dismiss or affirm heretofore filed, and also appear as an appendix to the brief for the appellant. The appellant in his brief appears to have supplied sub-titles which do not appear in the Code.

The opinion of the Court of Appeals of Maryland has not yet been officially reported, but may be found in the record in this case, beginning on page 18. (See also 150 Atl. Rep. 455). Judge DIGGES, who sat in the Circuit Court for Charles County, also filed an opinion which appears in the record, beginning at page 8.

THE JURISDICTION OF THIS COURT.

Counsel for the appellees have already filed a motion to dismiss or affirm the judgment of the Court of Appeals on the ground that the questions on which the decision in this case depends are so unsubstantial as not to need further argument, and do not present any substantial federal question. Since filing that motion, the attention of counsel for the appellee has been drawn to the fact that it does not appear from the record that the appellant ever sought to invoke the protection of the Constitution of the United States until after final judgment had been entered in the Court of Appeals of Maryland.

The appellant's bill of complaint alleges that the action of the appellees in interfering with the lawful use of his ducking blind "is a violation of his rights under the Constitution and Laws of the State of Maryland, and is depriving him of his property and lawful rights without any warrant or authority in law, and for which wrongs

he has no adequate remedy at law" (R., p. 2). The petition for appeal contains the following language:

> "Petitioner shows that in the record of proceedings it appears that there was drawn in question the validity of Sections 40, 41 and 46 of Article 99 of the Public General Laws of Maryland, Title Water Fowl, Birds and Game; subtitle, Water Fowl and Migratory Birds, and *it is claimed* that the said sections are repugnant to and in violation of the 14th Amendment of the Constitution of the United States, etc." (R., pp. 14-15).

On this record, therefore, it appears that the claim of a right under the Federal Constitution was made for the first time in the petition for appeal.

However, both the opinion of the trial court and of the Court of Appeals of Maryland indicate consideration of the application of the guaranties of the Fourteenth Amendment of the Constitution of the United States to the present case. Whether under such circumstances this Court has jurisdiction to entertain the present appeal does not appear clear on the decided cases.

In *Howard vs. Fleming,* 191 U. S. 126, at page 137, this Court said:

> "It does not appear that the Federal character of the questions was presented to the supreme court of the state, although in the opinions of the supreme court the questions themselves were fully discussed. But in the absence of any claim to protection under the Federal Constitution, we are compelled to hold that we have no jurisdiction in the case coming from the supreme court of the state, and the writ of error will be dismissed."

But see:

Miedreich vs. Lauenstein, 232 U. S. 236.

Mallinckrodt vs. Missouri, 238 U. S. 41.
Cissna vs. Tennessee, 246 U. S. 289.
Home Ins. Co. vs. Dick, 281 U. S. 397.

STATEMENT OF THE CASE.

The legislation, the validity of which is here challenged, in effect provides that no ducking blind shall be erected at a greater distance than 300 yards from low water mark, and that blinds shall be at least 500 yards apart. It also provides that floating blinds are unlawful, prescribes how blinds shall be built *and requires the removal of all blinds as soon as the ducking season is over.*

The Act protects the riparian owner by giving him the right to select a site for a blind in front of his property prior to October 10th of each and every year, provided his location is not more than 300 yards from shore, and not closer than 250 yards to the division line of his property. The latter limitation furnishes protection to the landowner with a small water front by preventing the adjoining riparian owner from placing their stakes so close to his division line as to leave him less than the required distance between their blinds for his location.

After the 10th of October anyone may take up a location for a blind, provided it is not less than 500 yards from a location already taken; and if a riparian owner, who has applied for a license prior to October 10th, does not erect a blind on the location marked by him before November 10th, then anyone can apply for and obtain a license for the same location.

If a person has less than 500 yards of waterfront he may secure the right to erect a blind by obtaining permission from the adjoining riparian owners to exercise their rights.

The appellant in this case is the owner of a tract of land bordering on the Potomac River *for a distance of 43 feet 7 inches* (R., p. 7). To the north of the appellant the riparian owner is one H. F. Olcott. To the south the riparian owner is Grover C. Willett whose property has a frontage on the river of about 260 feet. Adjoining the Willett property is that of Daniel Thew Wright, who owns a great stretch of shore front and who has purchased from Willett his rights in the matter of the erection and maintenance of ducking blinds (R., p. 7). On the 8th day of June, 1929, Judge Wright secured from the Circuit Court for Charles County a ducking blind license for the purpose of erecting a ducking blind in front of his property, and before October 10th of that year he placed a stake with his name and license number thereon in front of his property and a little more than 250 yards from the southern property line of the appellant (R., p. 7).

Notwithstanding the fact that he was the owner of a frontage of only 43 feet 7 inches, and that a duly licensed and lawfully erected stake stood only a little more than 250 yards from his southern property line, the appellant, prior to September 5th, 1929, proceeded to erect a ducking blind in front of his property and within a few yards of his southern property line. The admitted facts therefore show that if the challenged legislation is valid, the ducking blind of the appellant was illegally erected in

that it was less than 500 yards distant from the legally erected blind of Judge Wright, and less than 5 yards distant from the property line of Mr. Willett (R., p. 7).

HISTORY OF THE LEGISLATION INVOLVED.

For more than fifty years prior to the enactment of the legislation now complained of, the problem of the limitation and regulation of the taking of wild fowl in the State of Maryland had been regarded as one for local legislation. Each of the counties of the State had dealt with this problem after its own fashion, and the statute books were cluttered with local laws which applied only in the separate counties. Reference to some of the local legislation will be found in an appendix hereto.

By Chapter 767 of the Acts of 1914, the Legislature of Maryland enacted for Dorchester County a local law regulating the distance between ducking blinds and the distance at which blinds might be erected beyond low water mark. Thereafter analogous laws were passed for the various tide-water counties, but there was a wide variance in their provisions depending upon the particular wishes of the communities involved. By process of amendment the differences between the various local laws were increased rather than diminished.

Meanwhile migratory birds were rapidly decreasing in numbers, and this decrease had reached such alarming proportions that the United States in 1916 entered into a treaty with Canada, regulating the taking of migratory birds in the two countries. This Act prescribed certain seasons in certain territorial zones, in one of which was included the tide-waters of the State of Maryland. Since

that time, the federal government has rigidly enforced the provisions of this treaty in Maryland territory.

The Conservation Department of the State of Maryland has endeavored to co-operate to the fullest extent in the enforcement of both the state and federal laws for the protection of these birds. But the great variance between the several local acts applicable to the different counties made it impossible to protect the wild fowl on the Chesapeake Bay and its tributaries to the extent which all agreed to be desirable. Practically every statute governing the erection of ducking blinds prescribed different intervals between the blinds and different distances from shore at which blinds might legally be erected, and the Game Wardens were often at a loss to know whether a blind erected in a particular locality violated the law or not. (See Appendix hereto.)

Prior to 1927 the Conservation Department had made a complete study of these local laws and the effect thereof upon the wild fowl of the State. After the study was completed, a general law was prepared, prescribing uniform intervals and distances from shore at which ducking blinds might be erected on the tide-water of the State below mean low water. Certain variations in the distance from shore at which blinds might be erected were permitted in view of the differing topography of the shore lines of the Bay and its tributaries. Otherwise all distances were uniform. This recodification of the law included many features not involved in the present appeal. See Bagby's Code (1929 Supplement), Article 99.

As is the case in all matters of this kind, where a large amount of conflicting local legislation is repealed and one

general law substituted therefor, a great deal of opposition arose to the Act in question during its passage, and a number of amendments were offered and some of them adopted. As an example of this, when one of the sections in question in this case was under consideration (Section 46), which provides in part that no riparian owner shall place a blind closer than 250 yards from the dividing line of his property, that clause was objected to by three Counties and the following amendment adopted: "(the distance contained herein shall not apply to the waters that are tributary to the Chesapeake Bay and the Potomac River in the Counties of Charles, Calvert and St. Mary's)"; meaning that the tributaries of the Bay and the tributaries of the Potomac River within these three Counties shall not be subject to this provision of the Section. In this way the needs and desires of the various localities as expressed by their elected representatives were met.

The result of the deliberations of the Legislature was the enactment of Chapter 568 of the Acts of 1927, entitled "The Game Law", being a complete revision of all of the laws of the State in this regard. That Act was subsequently strengthened by the passage of Chapter 366 of the Acts of 1929.

The enactment of these laws has made it possible for the Conservation Department to protect wild fowl in the tidewaters of the State of Maryland, and as a result the supply of wild fowl has been materially increased.

THE PROCEEDINGS BELOW.

This case originated in a bill of complaint filed by the appellant against the appellees to enjoin them from interfering with the erection, maintenance and lawful use by the appellant of the ducking blind here involved.

The answer of the appellees alleged all the facts which have heretofore been stated, and showed that the appellees were acting in pursuance of the duties imposed upon them by law, and solely for the purpose of preventing the erection of a ducking blind in violation of the provisions of Sections 40, 41 and 46 of Article 99 of the Code of Public General Laws of Maryland.

At the hearing before the trial court, no testimony was offered by either side, the appellant admitting the truth of the facts alleged in the answer, and further admitting that if the provisions of law referred to in the answer are constitutional, then the appellees were acting within their rights, and that it was their duty as game wardens to destroy the blind in question.

ARGUMENT.

I.

THE STATE HAS PLENARY POWER TO REGULATE AND PROHIBIT THE ERECTION OF DUCKING BLINDS BELOW LOW WATER MARK.

II.

THE LEGISLATION HERE INVOLVED DOES NOT DISCRIMINATE AGAINST THE APPELLANT NOR DENY TO HIM THE EQUAL PROTECTION OF THE LAWS.

I.

In *Smith vs. Maryland*, 18 Howard, 71, this Court sustained the validity of an act of the Maryland Legislature prohibiting the taking of oysters in any of the waters of the State with a scoop or drag, or any other instrument than tongs or rakes. In delivering the opinion of the Court, Mr. Justice CURTIS said:

> "Whatever soil below low water mark is the subject of exclusive propriety and ownership, belongs to the state on whose maritime border, and within whose territory, it lies, subject to any lawful grants of that soil by the state, or the sovereign power which governed its territory before the Declaration of Independence.
>
> "*Pollard's Lessee v. Hagan*, 3 How. 212; *Martin v. Waddell*, 16 Pet. 367; *Den v. The Jersey Co.*, 15 How. 426.
>
> "But this soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell fish as floating fish.
>
> "*Martin v. Waddell; Den v. Jersey Co.; Corfield v. Coryell*, 4 Wash. C. C. 346; *Fleet v. Hegeman*, 14 Wend. 42; *Arnold vs. Mundy*, 1 Halst. (N. J.) 1; *Parker v. Cutler, Milldam Corporation*, 2 Appleton (20 Me.), 353; *Peck v. Lockwood*, 5 Day, 22; *Weston et al. v. Sampson et al.*, 8 Cush. 347.
>
> "The State holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction of the State

over it, and from its duty to preserve unimpaired those public uses for which the soil is held.

"*Vattel,* bk. 1, ch. 20, sec. 246; *Cornfield v. Correll,* 4 Wash. 376.

"It has been exercised by many of the States. See Angell on Tide Waters, 145, 156, 170, 192, 193."

In the subsequent case of *McCready vs. Virginia,* 94 U. S. 248, this Court sustained a statute enacted by the State of Virginia prohibiting the citizens of other states from planting oysters in Ware River, a tide-water stream in that State. Mr. Chief Justice WAITE, speaking for the Court, said:

"The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. *Pollard v. Hagan,* 3 How. 212; *Smith v. Md.,* 18 How. 74 (59 U. S. XV., 270); *Mumford v. Wardwell,* 6 Wall. 436 (73 U. S. XVIII. 761); *Weber v. Comrs.,* 18 Wall. 66 (85 U. S. XXI, 802). In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its People, and the ownership is that of the People in their united sovereignty. *Martin v. Waddell,* 16 Pet. 410. The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide-waters, and their beds to be used by its People as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is, in effect, nothing more than a regulation of the use by the People of their common property."

Accordingly it must be borne in mind that the State of Maryland, in regulating the positions at which ducking blinds may be erected below low water mark in the waters of the State, is not dealing with private property, but with the property of the people of the State.

Apart from the principle established in the cases to which reference has been made, it has repeatedly been laid down that the State has full power to enact legislation for the purpose of conserving game and other wild life. In *Manchester vs. Mass.*, 139 U. S. 240, this Court sustained an Act of the Legislature of the Commonwealth of Massachusetts regulating fishing in the waters of Buzzard's Bay. That act contained numerous prohibitions against the use of drag nets, purses, sweep seines, etc . Section 4 of the Act exempted from its provisions the use of certain nets "in the waters of the Town of Fairhaven within a line drawn from Commorant Rock southwesterly to the buoy on West Island Rips and from thence westerly in a straight course through the buoy on West Island Ledge to the town line of Fairhaven." Mr. Justice BLATCHFORD, speaking for the Court, said:

> "The Statute of Massachusetts which the defendant is charged with violating is, in terms, confined to waters 'within the jurisdiction of this Commonwealth'; and it was evidently passed for the preservation of the fish, and makes no discrimination in favor of citizens of Massachusetts and against citizens of other States. If there be a liberty of fishing for swimming fish in the navigable waters of the United States common to the inhabitants or the citizens of the United States, upon which we express no opinion, the Statute may well be considered as an impartial and reasonable regulation of this liberty; and the subject is one which a State may well be per-

> mitted to regulate within its territory, in the absence of any regulation by the United States. The preservation of fish, even although they are not used as food for human beings, but as food for other fish which are so used, is for the common benefit; and we are of opinion that the Statute is not repugnant to the Constitution and the laws of the United States."

In *Lawton vs. Steele*, 152 U. S. 137, this Court sustained the validity of an act of the Legislature of New York which provided that "No person shall at any time kill or take from the waters of Henderson Bay or Lake Ontario, within one mile from the shore, between the most westerly point of Pillar Point and the boundary line between the counties of Jefferson and Oswego * * * any fish of any kind by any device or means whatever otherwise than by hook and line or rod held in hand, etc." The Act further provided for the summary confiscation of any device found to be used in violation of this statute.

This Court, speaking through Mr. Justice Brown, said (pp. 138, 139):

> "The preservation of game and fish, however, has always been treated as within the proper domain of the police power, and laws limiting the season within which birds and wild animals may be killed or exposed for sale, and prescribing the time and manner in which fish may be caught, have been repeatedly upheld by the courts." * * *
>
> "As the waters referred to in the act are unquestionably within the jurisdiction of the state of New York, there can be no valid objection to a law regulating the manner in which fishing in these waters shall be carried on. *Hooker v. Cummings*, 20 Johns, 91, 11 Am. Dec. 249. The duty of preserving the fisheries of a state from extinction, by prohibiting

> exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish, is as clear as its power to secure to its citizens as far as possible, a supply of any other wholesome food."

In *Geer vs. Conn.*, 161 U. S. 519, this Court sustained an act of the State of Connecticut making it a criminal offense to have in possession for the purpose of transporting beyond the limits of the State, certain woodcock, grouse and quail. Mr. Justice WHITE, speaking for the Court said (p. 534):

> "Aside from the authority of the state, derived from the common ownership of game and the trust for the benefit of its people which the state exercises in relation thereto, there is another view of the power of the State in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the state of a police power to that end, which may be none the less efficiently called into play because by doing so interstate commerce may be remotely and indirectly affected. *Kidd v. Pearson*, 128 U. S. 1 (32; 346) 2 Inters. Com. Rep. 232; *Hall v. De Cuir*, 95 U. S. 485 (24; 547); *Sherlock v. Alling*, 93 U. S. 99, 103 (23; 819, 820); *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 194 (6:69). Indeed, the source of the police power as to game birds (like those covered by the statute here called in question) flows from the duty of the state to preserve for its people a valuable food supply. *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *Ex parte Maier*, ubi supra; *Magner v. People*, ubi supra, and cases there cited. The exercise by the State of such power therefore comes directly within the principle of *Plumley v. Massachusetts*, 155 U. S. 461, 473 (39:223, 227). The power of a state to protect by adequate police regulation its people against the adulteration of articles of food (which was in that

case maintained), although in doing so commerce might be remotely affected, necessarily carries with it the existence of a like power to preserve a food supply which belongs in common to all the people of the state, which can only become the subject of ownership in a qualified way, and which can never be the object of commerce except with the consent of the state and subject to the conditions which it may deem best to impose for the public good."

These authorities make it perfectly plain that the authority of the State to prohibit or regulate the erection of ducking blinds below low water mark is plenary, and it is submitted that the legislation here challenged is manifestly a reasonable exercise of that power.

II.

The appellant, while admitting that the State has full power to regulate or prohibit the erection of ducking blinds, asserts that the State may not adopt regulations which are discriminatory in their effect. The soundness of this contention is certainly open to question, where as here, the State is dealing with the public domain. Thus in *Bacon vs. Walker*, 204 U. S. 311, this Court, in sustaining a statute of Idaho prohibiting the grazing of sheep on the public domain within two miles of any dwelling house, said (p. 314):

> "The specifications of the grounds of the unconstitutionality of those sections were, in the courts below, and are, in this court (1) that plaintiff in error has an equal right to pasture with other citizens upon the public domain, and that, by imposing damages on him for exercising that right, he is deprived of his property without due process of law; (2) that a discrimination is arbitrarily and unlawfully made by the statutes between citizens engaged in sheep grazing on the public domain and citizens engaged in grazing other classes of stock.
>
> "These grounds do not entirely depend upon the same considerations. The first denies to the state any power to limit or regulate the right of pasture asserted to exist; the other concedes such power, and attacks it only as it discriminates against the grazers of sheep. We speak only of the right to pasture, because plaintiff in error does not show that he is the owner of the land upon which his sheep grazed, and what rights owners of land may have to attack the statute we put out of consideration. *New York ex rel Hatch v. Reardon*, 204 U. S. 152, ante, 415, 27 Sup. Ct. Rep. 188. But we may remark that the Supreme Court of Idaho said in *Sweet v. Ballentyne*, 8 Idaho, 431, 440, 69 Pac. 995:

'These statutes (1210, 1211, quoted above) were not intended to prevent owners from grazing sheep upon their own lands, although situated within 2 miles of the dwelling of another.' Is it true, therefore, even if it be conceded that there is right or license to pasture upon the public domain, that the State may not limit or regulate the right or license? Defendants in error have an equal right with plaintiff in error, and the state has an interest in the accommodation of those rights. It may even have an interest above such accommodation. The laws and policy of a state may be framed and shaped to suit its conditions of climate and soil. Illustrations of this power are afforded by recent decisions of this court. In *Clark v. Nash,* 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, a use of property was declared to be public which, independent of the conditions existing in the State, might otherwise have been considered as private. So also in *Strickley v. Highland Boy Gold Min. Co.,* 200 U. S. 527, 50 L. Ed. 581, 26 Sup. Ct. Rep. 301. In the first case there was a recognition of the power of the state to deal with and accommodate its laws to the conditions of an arid country and the necessity of irrigation to its development. The second was the recognition of the power of the state to work out from the conditions existing in a mining region the largest welfare of its inhabitants. And again, in *Offield v. New York, N. H. & H. R. Co.,* 203 U. S. 372, ante, 231, 27 Sup. Ct. Rep. 72, the principle of those cases was affirmed and applied to conditions entirely dissimilar, and it was declared that it was competent for a state to provide for the compulsory transfer of shares of stock in a corporation, the ownership of which stood in the way of the increase of means of transportation, and the public benefit which would result from that. Of pertinent significance is the case of *Ohio Oil Co. v. Indiana,* 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576. There a statute of the state of Indiana was attacked, which regulated the sinking, maintenance, use, and operation of natural gas and oil

wells. The object of the statute was to prevent the waste of gas. The defendants in the action asserted against the statute the ownership of the soil and the familiar principle that such ownership carried with it the right to the minerals beneath and the consequent privilege of mining to extract them. The principle was conceded, but it was declared inapplicable, as ignoring the peculiar character of the substances—oil and gas—with which the statute was concerned. It was pointed out that those substances, though situated beneath the surface, had no fixed situs, but had the power of self-transmission. No one owner, it was therefore said, could exercise his right to extract from the common reservoir, in which the supply was held without, to an extent, diminishing the source of supply to which all the other owners of the surface had to exercise their rights. The waste of one owner, it was further said, cause by a reckless enjoyment of his right, operated upon the other surface owners. The statute was sustained as a constitutional exercise of the power of the state, on account of the peculiar nature of the right and the objects upon which it was exerted, for the purpose of protecting all of the collective owners.

"These cases make it unnecessary to consider the argument of counsel based upon what they deem to be the limits of the police power of a state, and their contention that the statute of Idaho transcends those limits."

See also the learned opinion of Mr. Justice WHITE in *Geer vs. Connecticut, supra.*

But it is not necessary to rely on so broad a proposition as appears to have been laid down in those cases, for the statutes here involved manifestly do not discriminate against the appellant. The provisions of the law requiring that blinds be placed at an interval of not less

than 500 yards is a protection to the hunter from the standpoint of safety, and a protection to the wild fowl in that it enables them to get into shallow water for raising and feeding.

The provision that no blind shall be erected prior to November 10th, within 250 yards of the property line of any adjoining riparian owner, was enacted in order to protect such riparian owners in the enjoyment of the privilege which the State saw fit to confer upon them. Similar provisions have long been contained in local legislation. (See Appendix hereto.) Were it not so provided, any person might erect blinds in front of shore property and entirely destroy its availability for the very purpose for which it had been purchased at great cost by the shore owner. Moreover, in view of the 500-yards interval prescribed, a riparian owner might be deprived of the privilege of erecting any blind, even though his shore front should extend for 1,000 yards, if his neighbors should see fit to place blinds right up against their property line.

It is true that the appellant in this case, *who owns only 44 feet of shore front,* may not erect a blind prior to November 10th of any year without obtaining the permission of the adjoining riparian owners. But there is nothing to prevent him from doing what they have done, namely, from acquiring sufficient shore front to obtain the privilege which the State has conferred upon them.

The principle underlying this legislation has repeatedly been sustained by this Court. In addition to *Bacon vs. Walker, supra,* reference is made to *Lindsley vs. Nat-*

ural Carbonic Gas Co., 220 U. S. 61; *Walls vs. Midland Carbon Co.*, 254 U. S. 300; *Gorieb vs. Fox*, 274 U. S. 603.

On the authority of those cases, the Circuit Courts of Appeals for the Fifth and Eighth Circuits, have sustained legislation prescribing the intervals and fixing the distance from adjoining property lines at which wells for oil or gas may be drilled.

See:

Oxford Oil Co. vs. Atlantic Oil Co., 22 Fed. (2d) 597, Certiorari denied, 277 U. S. 585;

Marrs vs. Oxford, 32 Fed. (2d) 134, Certiorari denied, 280 U. S. 573.

These cases we think conclusively establish the validity of provisions prohibiting the erection of ducking blinds within 250 yards of the property line of any adjoining riparian owner. The appellant, while apparently conceding the validity of these provisions, seems to think that the further provision authorizing an adjoining property owner to consent to the erection of a ducking blind nearer to his property line than 250 yards, invalidates the legislation. *But once the power of the State to prohibit the erection of the ducking blind for the benefit of adjoining property owners is conceded, then there can be no objection to that property owner waiving the provision made for his benefit.*

In *Cusack vs. Chicago*, 242 U. S. 526, this Court sustained a municipal ordinance of the City of Chicago governing the erection and maintenance of billboards in that city. That act prohibited the erection of any billboard in

any block in which one-half of the buildings on both sides of the street were used exclusively for residence purposes without first obtaining the consent in writing of the owners of a majority of the frontage. Mr. Justice CLARK spoke for the Court as follows (p. 530):

> "The claim is palpably frivolous that the validity of the ordinance is impaired by the provision that such billboards may be erected in such districts as are described if the consent in writing is obtained of the owners of a majority of the frontage on both sides of the street in any block in which such billboard is to be erected. The plaintiff in error cannot be injured, but obviously may be benefited, by this provision, for without it the prohibition of the erection of such billboards in such residence sections is absolute. He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property. *Tyler vs. Judges of Ct. of Registration*, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; *Plymouth Coal Co. vs. Pennsylvania*, 232 U. S. 531, 58 L. ed. 713, 34 Sup. Ct. Rep. 359. To this we may add that such a reference to a neighborhood of the propriety of having carried on within it trades or occupations which are properly the subject of regulation in the exercise of the police power is not uncommon in laws which have been sustained against every possible claim of unconstitutionality, such as the right to maintain saloons (*Swift vs. People*, 162 Ill. 534, 33 L. R. A. 470, 44 N. E. 528), and as to the location of garages (*People ex re. Busching vs. Ericsson*, 263 Ill. 368, L. R. A. 1915D, 607, 105 N. E. 315, Ann. Cas. 1915C, 183). Such treatment is plainly applicable to offensive structures.
>
> "The principles governing the exercise of the police power have received such frequent application, and have been so elaborated upon in recent decisions of this court, concluding with *Armour & Co. vs. North Dakota*, 240 U. S. 510, 514, 60 L. ed.

771, 775, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548, that further discussion of them would not be profitable, especially in a case falling as clearly as this one does within their scope. We therefore content ourselves with saying that while this court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the state enacting them, and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court of the state whose people are directly concerned, that it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals or to the general welfare. *Jacobson vs. Massachusetts*, 197 U. S. 11, 30, 49 L. ed. 643, 651, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765. And this, for the reasons stated, cannot be said of the ordinance which we have here.

"The plaintiff in error relies chiefly upon *Eubank v. Richmond*, 226 U. S. 137, 57 L. ed. 156, 42 L. R. A. (N. S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192. A sufficient distinction between the ordinance there considered and the one at bar is plain. The former left the establishment of the building line untouched until the lot owners should act, and then made the street committee the mere automatic register of that action, and gave to it the effect of law. The ordinance in the case at bar absolutely prohibits the erection of any billboards in the blocks designated, but permits this prohibition to be modified with the consent of the persons who are to be most affected by such modification. The one ordinance permits two-thirds of the lot owners to impose restrictions upon the other property in the block, while the other permits one-half of the lot owners to remove a restriction from the other property owners. This is not a delegation of legislative power, but is, as we have seen, a familiar provision affecting the enforcement of laws and ordinances."

Finally the appellant offers a faint contention that the legislation in question is discriminatory because it is not applicable to the tributaries of the Chesapeake Bay and the Potomac River in the Counties of Charles, Calvert and St. Mary's. The reasons why the Act is not uniform in every particular as to all of the waters of the State have heretofore been explained. They are chiefly historical. In any event, the right of the State to make territorial classifications of this character is clearly established by the decisions in *McCready vs. Va.*, 94 U. S. 248; *Manchester vs. Mass.*, 139 U. S. 240, and *Lawton vs. Steele*, 152 U. S. 137, which have heretofore been referred to at length in this brief.

CONCLUSION.

It is respectfully sumitted that no question is presented by this appeal that has not been fully covered by applicable decisions of this Court; that the statutes here involved are manifestly valid, and that the judgment of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted,

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APPENDIX.

The following are references to the Acts of the Legislature of Maryland regulating the erection and maintenance of ducking blinds, all of which were repealed by Chapter 568 of the Acts of 1927, which recodified and revised the entire game laws of the State of Maryland:

ANNE ARUNDEL COUNTY
- Chapter 486, Acts of 1904
- Chapter 369, Acts of 1906
- Chapter 465, Acts of 1906
- Chapter 189, Acts of 1910

CALVERT COUNTY
- Chapter 359, Acts of 1922

DORCHESTER COUNTY
- Chapter 767, Acts of 1914
- Chapter 185, Acts of 1922

KENT COUNTY
- Chapter 487, Acts of 1922
- Chapter 458, Acts of 1922

CECIL COUNTY
- Chapter 458, Acts of 1922

QUEEN ANNE'S COUNTY
- Chapter 768, Acts of 1912

ST. MARY'S COUNTY
- Chapter 264, Acts of 1920

TALBOT COUNTY
- Chapter 88, Acts of 1920
- Chapter 212, Acts of 1922
- Chapter 304, Acts of 1922

See also Chapter 315 of the Acts of 1914, relating to the Patuxent River and its tributaries.

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 402.—October Term, 1930.

Thomas M. Wampler, Appellant,
vs.
E. Lee Lecompte, State Game Warden, et al.

Appeal from the Court of Appeals of the State of Maryland.

[December 8, 1930.]

Mr. Justice Brandeis delivered the opinion of the Court.

The game laws of Maryland provide for granting annual licenses for the erection and maintenance of duck blinds in the waters of the State. No blind may be placed at a greater distance from the natural shore than 300 yards; and blinds must be at least 500 yards apart. A preferential right to select the position for a blind is conferred upon the riparian owner; but he may not place a blind "within 250 yards of the dividing line of any property owned by him and the adjoining property bordering on said waters . . . unless with the consent of the adjoining landowner." For certain waters the limitations prescribed are different from those above stated. In some, permission to erect a blind is wholly denied. For others, existing licenses are made renewable without condition. Code of Public General Laws of Maryland, Article 99, ~~secs. 39-46~~; ~~Acts of 1927, c. 589, secs. 39-40; Acts of 1929, c. 366, secs. 39-41.~~ (Supp. 1929) §§ 40-47.

Wampler, a resident of Charles County, owns land bordering on the Potomac River for a distance of less than 44 feet. Claiming to act under a license issued to him in June, 1929, he erected a duck blind at a point within 250 yards of the dividing line of his land and that of the adjoining owners on both the north and the south. Game wardens, acting pursuant to the statutes, destroyed Wampler's blind as being an illegal structure; and they threatened to destroy any other blind which he might erect under like conditions. To enjoin such action Wampler brought this suit against them in a state court. He conceded that the State has power to prohibit altogether the erection of blinds or to regulate their erection